leaks complained of have been cured and that the replacing of the front of the roof is something which the plaintiffs have thought desirable rather than necessary. Thus for the estimation of the cost for repairs as given by Mr. Gudgeon I award $8,330. As for the other matters not covered by Mr. Gudgeon and referred to by Mr. Paul Yong I award damages on the following basis:—

Adjusting the door and collapsable gate and replacing the frames	$200
Taking down the show cases and fitting them back after repairs	$300
Cost of storage of goods during the period of repairs (3 weeks)	$770
Cleaning the building	$100

As to the loss of profits there has been a remarkable 'error' and upon the basis of the net profits of two years I award damages of $491.28 for that. In that the receipt of profits contemplates the payment of staff and overheads I cannot see how this sum can be claimed at all and I disallow it.

As for the damage of the goods in the shop arising from a leakage to the roof I can but say here again that the plaintiffs, to my mind, overstated their case. In particular I would prefer the evidence of Mr. Ting to anything that has been put to me to suggest he visited the shop in order to examine these particular goods before the list of goods, Ex. P.10, was prepared in May 1967. The evidence of Mr. Kueh Teck Lin was far from convincing in this respect, and I particularly note that the question of damage to fans and to the cabinet leave much to be desired. That packages were damaged I do not doubt but that there has been a total loss of saleable value for the majority of these items cannot, to my mind, be true. I would, therefore, allow only what I consider on the evidence to be a fair price for the items set out in Ex. P.10 excluding fans and cabinet. This I estimate to be $2,750.65. It is in these circumstances that I enter judgment for the plaintiffs against the defendant in the sum of $12,941.93.

Order accordingly.

RE APPLICATION OF ASIA INSURANCE CO. LTD. OSMAN v. TAN SWEE LIANG

[O.C.J. (Pawan Ahmad J.) May 3, 1968]
[Ipoh — Suit No. 684 of 1967]

Practice and Procedure — Judgment in default of appearance — Whether stranger to the proceedings can set it aside — Regular judgment — No merits disclosed in affidavit — Grounds and source of information not disclosed — No reason for not entering appearance — Not entitled to set aside — R.S.C. 1957, O. 13 r. 10; O. 27 r. 15; O. 70 r. 3 — Courts of Judicature Act, 1964, s. 23 — Courts Ordinance, 1948, 3rd Sch. r. 2(1).

Road Traffic — Notice of proceedings to insurer — Road Traffic Ordinance, 1958; s. 80(2)(a).

As a result of a collision between a motor vehicle driven by the defendant and a motor cycle ridden by the plaintiff, the latter suffered injuries. The motor cyclist's solicitors wrote to the defendant that unless the matter was settled amicably legal proceedings would be instituted to claim damages and sent a copy of the letter to the defendant's insurers. There being no reply the plaintiff issued and served a writ to which no appearance was entered. The plaintiff then obtained an interlocutory judgment in default of appearance. Following this the insurers made an application by way of summons in chambers under Order 13 rule 10 and Order 27 rule 15 of the Rules of the Supreme Court, 1957 to set aside the interlocutory judgment entered against the defendant.

Held, dismissing the application: (1) though the applicants were strangers to the action they were still entitled to make the appplication on the ground that they might be seriously affected by the judgment;

(2) as on the facts the interlocutory judgment was obtained regularly the applicants were not entitled to have it set aside as of right but had to satisfy the court by way of an affidavit that they had a *prima facie* defence and that they had a reasonable excuse for not entering appearance. The affidavit of the defendants was not an affidavit of merits and it did not disclose that the applicants had a *prima facie* defence.

Cases referred to:—

(1) *Jacques* v. *Harrison* (1884), 12 Q.B.D. 165.

(2) *Windsor* v. *Charlcraft* [1939] 1 Q.B. 279.

(3) *The South British Insurance Co. Ltd.* v. *Haji Ismail: Sim Kek Yeow, Intervener* [1964] M.L.J. 16.

(4) *Evans* v. *Bartlam* [1937] A.C. 473, 480.

ADJOURNED SUMMONS.

Daljit Singh for the applicants.

P. P. Dharmananda for the plaintiff.

Defendant absent.

Cur. Adv. Vult.

Pawan Ahmad J.: This is an application by way of summons-in-chambers under Order 13 rule 10 and Order 27 rule 15 of the Rules of the Supreme Court, 1957, to set aside the interlocutory judgment entered against the defendant on the 25th day of January 1968. The application was subsequently adjourned to open court for hearing under Order 54 rule 22.

The applicants who are the Asia Insurance Company Limited, by a policy of insurance dated the 25th day of January 1967 insured the defendant, among other things, against liability for injuries suffered by any third party caused by or in connection with the use of motor vehicle No. JB 379. This policy was valid from 1st January 1967 to 31st December 1967.

On 15th March 1967 at about 4.00 p.m. the said motor vehicle driven by the defendant had a collision with a motor cycle ridden by the

plaintiff near the junction of High Road and Gharry Kuchi Road, Nibong Tebal, Penang. As a result of the collision the plaintiff suffered a number of injuries. So on the 13th December 1967 the plaintiff through his solicitors sent a notice to the defendant stating that unless the defendant agreed by 20th December 1967 to discuss the terms upon which the plaintiff's claim for damages can be settled amicably, the plaintiff would proceed to file an action for damages against the defendant in the High Court at Ipoh. A copy of this notice was served on the applicants on 14th December 1967. No reply was received by the plaintiff from the defendant or the applicants; and so on 21st December 1967 the plaintiff filed the present writ of summons in the High Court, Ipoh. A copy of this writ with an accompanying letter was sent by A.R. registered post to the applicants on the same day and received by them on or about the 26th of December 1967.

The writ was served on the defendant on 13th January 1968 and as no appearance was entered the plaintiff obtained interlocutory judgment against the defendant on 25th January 1968.

As far as this application is concerned, the applicants are relying entirely on the joint affidavit of Wong Kok Kee and Lim Kean Siew dated 14th March 1968 at enclosure 13. It was submitted by the applicants that though they are strangers to the action they are still entitled to make this application on the ground that they may be injuriously affected by the judgment. I am in full agreement with this submission. (See *Jacques* v. *Harrison* [1]; *Windsor* v. *Charlcraft* [2]; and *The South British Insurance Co. Ltd.* v. *Haji Ismail: Sin Kek Yeow, Intervener* [3]).

It was also submitted by the applicants that the court has jurisdiction to set aside a judgment in default. I also accept this submission. However, the principle under which the court should exercise this discretion is discussed in *Mallal's* Supreme Court Practice at page 336 under the heading: "Principle in Exercising Discretion". Further Lord Atkin in his judgment in the case of *Evans* v. *Bartlam* [4] states as follows:—

> "The courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a *prima facie* defence."

This matter is also stated in *Odgers* on Pleading and Practice, 18th Edition, at page 56, paragraph 1 as follows:—

> "A judgment irregularly obtained will be set aside as of right; but the irregularities relied on must be specified in the summons (Order 70, r. 3). But before granting any application to set aside a judgment regularly obtained (i.e. strictly in compliance with the rules), the court will require to be satisfied not only that the defendant had some reasonable excuse, e.g. illness, for failing to enter an appearance, but also as to his 'merits', i.e. that in the action itself there is some prospect of his being at least partly successful. An affidavit is usually necessary for this purpose."

The applicants in the first instance submitted that the interlocutory judgment was irregularly obtained because the action was filed in Ipoh though the cause of action arose in Penang and the defendant was residing in Kedah. It was the contention of the applicants that the filing of the action in Ipoh is contrary to the provisions of section 23 of the Courts of Judicature Act 1964. The term "High Courts" is however defined in section 3 of the Courts of Judicature Act to mean the High Court in Malaya, the High Court in Borneo and the High Court in Singapore. Because of this definition I think the plaintiff is entitled to file the action in any branch of the High Court in Malaya. The defendant is, however, not precluded from making an application under Rule 2(1) of the Third Schedule to the Courts Ordinance 1948 to have the action transferred to the High Court Penang or Alor Star. The interlocutory judgment was therefore obtained regularly.

It was also submitted that the interlocutory judgment was irregularly obtained because the applicants did not receive any communication from the plaintiff or his solicitors that the writ of summons had been served on the defendant and that they were proceeding to enter interlocutory judgment against the defendant. At the same time, the applicants admitted that they had received the notice and a copy of the writ from the plaintiff. No provision of the law was however pointed out to show that there is such a duty on the part of the plaintiff. The requirement of section 80(2)(a) of the Traffic Ordinance, 1958, is that the plaintiff should give notice of the proceedings to the insurer before or within seven days after the commencement of the proceedings. The plaintiff complied with this provision of the law as he sent a copy of the writ with a letter to the applicants by A.R. registered post. Since the applicants had notice of the commencement of the proceedings they could easily have entered an appearance but failed to do so. I am therefore unable to accept this submission.

Another argument raised by the applicants was the failure on the part of the defendant to comply with the terms of the insurance policy and to reply to the several requests of the applicants. In my view, this failure does not affect the rights of the plaintiff. (See section 78 of the Road Traffic Ordinance, 1958).

Since the applicants failed to prove that the interlocutory judgment was irregularly obtained, it will not be set aside as of right. In

order to succeed in this case where the plaintiff had obtained the interlocutory judgment regularly the applicants must satisfy the court as to the merits of their affidavit and that they had a reasonable excuse for not entering appearance.

The facts deposed in paragraph 6 and 7 of the joint affidavit dated 14th March 1968 (enclosure 13) are not from the personal knowledge of the deponents; they are merely statements of information or belief. Under the heading "Contents of Affidavit" at page 120 of the *Basic Rules of the Supreme Court*, 2nd Edition, by Lewis F. Sturge, it is stated that "affidavits shall be confined to such facts as the witness is able of his own personal knowledge to prove. Provided that in interlocutory proceedings . . . . the affidavit may contain statements of information or belief, with the sources and grounds thereof." In this case the sources and grounds of the statements of information or belief have not been disclosed in the affidavit, and I therefore fail to find any merits in the affidavit. There is also no reasonable excuse for the applicants not to enter an appearance. In the event, the applicantion was dismissed with cost.

Application dismissed.

Solicitors: *Lim Kean Siew & Co.; Dharmananda & Co.*

PARAMOO v. ZENO LTD.

[F.C. (Barakbah L.P., Suffian & MacIntyre F.JJ.) May 13, 1968]

[K.L. — Federal Court Civil Appeal No. X.35 of 1967]

Companies — Charge on land — Failure to register — Charge registered with Registrar of Companies — Companies Ordinance, 1940, s 80.

Land Laws — Caveat — Lien — Caveat avoided for non compliance — Whether lien avoided also — Land Code (F.M.S. Cap. 138), ss. 96, 129, 134, 166 & 167.

This was an appeal by the second defendant against the judgment of Raja Azlan Shah J. reported in [1967] 2 M.L.J. 104. It was contended on appeal that (a) as the charge was not enforceable as such, the lien was not enforceable either and (b) the lien did not comply with the law because there was no intention to create a lien as required by section 134 of the Land Code and the caveat lodged did not state the nature of the interest in the land caveated as required by section 167 of the said Code and the ground upon which the claim was founded.

Held, dismissing the appeal: (1) the Land Code makes it quite clear that a charge is quite distinct from a lien. A lien under the Code is a statutory lien and it has an independent existence apart from a charge so that if a charge is avoided for non-compliance with the law, the lien is not avoided also provided of course it complies with the law;

(2) clause 6 of the mortgage and general charge clearly showed an intention to create a lien. An examination of the caveat showed the nature of the interest in the land caveated and the ground upon which the claim was founded.

Cases referred to:—

(1) *In re Molton Finance Ltd.* [1967] 3 W.L.R. 1561.

(2) *Palaniappa Chetty* v. *Dupire Brothers & Anor* (1919), 1 F.M.S.L.R. 370.

(3) *Registrar of the Supreme Court* v. *Kong Peng Kee & Ors.* (1922), 3 F.M.S.L.R. 80.

(4) *L.R.M. Raman Chetty* v. *K.V.A.L. Muthiah Chetty* (1923), 3 F.M.S.L.R. 177.

The following cases were also cited: (1) *Great Northwest Central Railway Co.* v. *Charlebois* [1899] A.C. 114; (2) *In re Jon Beaufort London Ltd.* [1953] 1 All E.R. 634; (3) *Re White Rose Cottage* [1965] 1 All E.R. 11; (4) *In re Monolithic Building Co.* [1951] 1 Ch. 643; (5) *Edwards* v. *Edwards* (1876), 2 Ch. D. 291 and (6) *Connecticut Fire Insurance Co.* v. *Cavanagh* [1892] A.C. 473, 480.

FEDERAL COURT.

C. Thambiah for the appellant.

Chooi Mun Sou for the respondents.

Cur. Adv. Vult.

Suffian F.J.: In the lower court the plaintiffs (now respondents) claimed against the Prefabricated Construction Co. (Malaya) Ltd., the first defendants (not appealing), and against P. Paramoo, the second defendant (now appellant).

The facts are as follows. The first defendants are registered proprietors of land held under E.M.R. 4031 for Lot 703 in the Mukim of Bukit Raja, in the District of Klang. On 16th February, 1962, a resolution (Exhibit P.1) was passed by the plaintiffs. It authorised the company, first, to affix their seal to a memorandum of charge created by the first defendants in favour of the plaintiffs to secure the repayment of $75,000 lent to the plaintiffs and, secondly, to approve the sum of $75,000 lent to the first defendants between October 1961 and February 1962. On the same day the first defendants executed a "mortgage and general charge" (Exhibit P.2) in favour of the plaintiffs to secure repayment of the principal sum of $75,000 lent to the first defendants with interest thereon at 5% per annum. The charge was never registered in the Land Office though it was registered under section 80 of the Companies Ordinance No. 49 of 1940 on 9th March, 1962.

It was a term of the charge that (clause 6) "the mortgagor (first defendants) further hereby deposit the title for the land concerned with the lender (the plaintiffs) as security for principal and interest and the lender may lodge a caveat with the Collector of Land Revenue to create a lien." A caveat was lodged with the Collector of Land Revenue, Klang, on 23rd April, 1962.

On 31st October, 1963, the second defendant, a contractor, obtained judgment in the sum